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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1276

DORTHA ALLEN GUY,

Petitioner,

—v.—

ROBBINS & MYERS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In the

Supreme Court of the United States

October Term, 1975

No. 75-.....

Dortha Allen Guy,

Petitioner,

—v.—

Robbins & Myers, Inc.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 24, 1975, rehearing and rehearing en banc having been denied December 9, 1975.

Opinions Below

The decision of the United States Court of Appeals for the Sixth Circuit and the order denying the petitions for rehearing and rehearing en banc of the petitioners herein, reported at 525 F.2d 124, are reprinted *infra* at 11a and 23a.[1] The memorandum opinion and order of the United States District Court for the Western District of Tennessee dismissing plaintiff's action and its order adhering thereto on reconsideration, reported at 8 E.P.D. ¶¶ 9573 and 9574, are reprinted *infra* at 1a and 6a, respectively.

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[1] This form of citation is to pages of the Appendix.

Jurisdiction

The judgment and opinion of the Court of Appeals was entered on October 24, 1975. The petitioner's petition for rehearing and rehearing en banc were denied on December 9, 1975. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Question Presented

Petitioner's employer discharged her on October 25, 1971. On October 27, 1971, a union grievance was filed on her behalf, which was denied on November 18, 1971. February 10, 1972, 108 days after her discharge, but only 84 days from denial of her grievance, petitioner filed a Title VII charge with the Equal Employment Opportunity Commission alleging racial discrimination.

Did the Court of Appeals err in dismissing this Title VII action on the ground that the charge which petitioner filed with the EEOC was untimely?

Statutory Provisions Involved

Section 706(d) of the Civil Rights Act of 1964, 78 Stat. 241, 260, 42 U.S.C. § 2000e-5(d) (1970), before its amendment in 1972, read as follows:

> (d) A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), such charge shall be filed by the person aggrieved within two hundred and ten days

after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

The same provision, as amended by Section 4(a) of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 105, and renumbered Section 706(e), 42 U.S.C. § 2000e-5(e) (Supp. II 1972), reads as follows:

"(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with in State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency."

Section 14 of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 113, reads as follows:

> The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act [March 24, 1972] and all charges filed thereafter.

Statement of the Case

The petitioner, Dortha Allen Guy, brought this action under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e et seq., and the Civil Rights Act of 1866, 42 U.S.C. § 1981. Mrs. Guy's complaint, brought against her former employer, respondent Robbins & Myers, Inc. (the Company), and her labor union, Local 790 of the International Union of Electrical, Machine and Radio Workers (the Union), alleged that the Company had discriminated against her because of her race (black), both in discharging her and in failing to reinstate her, and that the Union had not fairly represented her in grievance proceedings.

Mrs. Guy was discharged from her employment on October 25, 1971. Two days later, on October 27, 1971, she caused a grievance to be filed on her behalf,[2] pursuant to the provisions of the collective bargaining agreement between the Company and the Union. The grievance stated: "Protest unfair action of company for discharge. Ask that she be reinstated with compensation for lost time." It was unsuccessfully carried through the third step of the

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[2] Plaintiff was absent from work from October 24, 1971 until October 29, 1971, and thus was not present on the day of her discharge. One of her co-workers filed the grievance on her behalf. When plaintiff returned to work on October 29, 1971, she immediately began personally processing the grievance through the various steps of the grievance-arbitration process.

grievance process, where it was denied in writing by the Company's Personnel Director on November 18, 1971. The denial simply stated that the appellant had been rightfully discharged. Plaintiff did not press this grievance beyond the third step, and the Union accordingly did not take appellant's claim to arbitration.[3]

On February 10, 1972, 108 days after her discharge but only 84 days following the denial of her grievance, Mrs. Guy filed a charge with EEOC, alleging racial discrimination in her discharge. EEOC accepted and processed her charge, and informed her on November 20, 1973 that it had found no reasonable cause to believe that her discharge was racially motivated[4] and giving her formal notice of her rights to sue under Title VII. She then instituted an action against the Company and the Union in the United States District Court for the Western District of Tennessee.

However, by Order of June 12, 1974, the District Court granted the Company's motion to dismiss[5] plaintiff's Title VII allegations on the ground that plaintiff had not filed her charge of discrimination within the 90-day period pre-

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[3] The four steps provided for in the Collective Bargaining Agreement (Article XVIII-Grievance Procedure) follow lines that are fairly common in such agreements. Step 1 provides for proceedings between the employee and his foreman, Step 2 between the Chief Steward and the General Foreman, Step 3 between the Union Officers and representatives of Management, and Step 4 for arbitration.

[4] A finding of no reasonable cause is not a bar to a Title VII action. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 48, n. 8 (1974).

[5] The district court had earlier dismissed the case, insofar as it was grounded on 42 U.S.C. § 1981, because of the applicable Tennessee statute of limitation.

scribed by Section 706(d) of the Civil Rights Act of 1964 before its amendment in 1972. The Court further held that the 90-day period had not been tolled during the processing of her grievance (1a-5a). On June 19, 1974, the District Court refused to modify its prior holdings (6a-10a).

Subsequently, the defendant Union was realigned as a party plaintiff, Mrs. Guy and the Union filed timely Notices of Appeal to the United States Court of Appeals for the Sixth Circuit, and EEOC appeared in support of their appeal as amicus curiae.

The Court of Appeals affirmed the dismissal of the complaint on October 24, 1975, by a 2-1 vote (11a-22a) and denied petitioner's petition for rehearing and rehearing en banc on December 9, 1975 (23a).

The Court of Appeals (1) held that Mrs. Guy by filing her Union grievance did not toll the running of the Title VII statute of limitations for filing a charge with the EEOC; (2) implicitly held that the statute of limitations for filing a charge with the EEOC began to run on the day that petitioner was initially dismissed, even though the company's decision did not become final until the completion of the grievance process; and (3) held the 1972 amendments to Title VII, insofar as they extended the period for filing EEOC charges from 90 to 180 days, should not be applied to cases which arise before the amendment but which were still pending on the effective date of those amendments.

Reasons for Granting the Writ

The question presented raises three important issues concerning the implementation of Title VII by the courts and by the EEOC. The Sixth Circuit's decision regarding each of these issues is in conflict with the decisions of other courts of appeals. All three of the issues in conflict are now directly before the Court in *McDonald* v. *Santa Fe Transportation Company*, No. 75-260, *cert. granted*, 46 L.Ed 2d 248 (Nov. 3, 1976).[6] The issue in conflict concerning the application of the 1972 amendments to litigation pending as of the effective date of those amendments is before this Court in a closely analogous form in *Brown v. General Services Administration*, No. 74-768, *cert. granted*, 421 U.S. 987 (1975) and *Place* v. *Weinberger*, No. 74-116, *cert. denied*, 419 U.S. 1040 (1974), Petition for Rehearing pending.[7]

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[6] In order to reach the question presented in *McDonald*, whether a white employee may raise a claim of race discrimination under Title VII, it must be determined that the statutory period for filing a charge with the EEOC was tolled pending grievance proceedings and that the 1972 amendment to Title VII extended the period of time within which to file a charge with the EEOC from 90 to 180 days to all pending litigation. See Brief *Amicus Curiae* of the NAACP Legal Defense and Educational Fund, Inc., at p. 2.

If the Court determines either that the statute of limitation is tolled during the processing of a grievance or that the 180 day provision applies to pending charges, then the *Guy* decision must be reversed.

[7] Both *Brown* and *Place* present the question, *inter alia*, whether the 1972 amendments to Title VII, insofar as they create new remedies for federal employees, should be applied to cases still pending on the date when the amendments become effective.

I.

The Decision Below Is in Conflict With the Decisions of Other Courts of Appeals on the Same Matters.

A.

The Sixth Circuit's holding that the filing of a union grievance does not toll the running of the time period for filing a Title VII charge conflicts with decision of three other circuits.[8] The Fifth,[9] Ninth[10] and Tenth Circuits[11] have all held that the time within which an aggrieved person might file Title VII charges with EEOC

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[8] In this case the Sixth Circuit held "[i]t would therefore appear to us to be utterly incongruous for us to hold that a federal statute which contains jurisdictional prerequisites for the exercise of its remedies is tolled by the mere filing of a grievance under a collective bargaining agreement". 17a and 525 F. 2d at 128.

[9] "We, therefore, hold that the statute of limitations . . . is tolled once an employee invokes his contractual grievance remedies in a constructive effort to seek a private settlement of his complaint." (footnote omitted) *Culpepper* v. *Reynolds Metals Company*, 421 F.2d 888, 891 (5th Cir. 1970); see also *Hutchings* v. *United States Industries, Inc.*, 428 F.2d 303, 312 (5th Cir. 1970).

[10] "Since Title VII seeks to utilize private settlement as an effective deterrent to employment discrimination, we hold that the 210-day statute of limitations is tolled while an employee in good faith pursues his contractual grievance remedies in a constructive effort to obtain a private settlement". *Malone* v. *North American Rockwell Corporation*, 475 F.2d 799, 781 (9th Cir. 1972).

[11] *Sanchez* v. *Trans World Airlines, Inc.*, 499 F.2d 1107, 1108 (10th Cir. 1974). In *Sanchez*, which was decided after *Alexander* v. *Gardner-Denver Corp.*, 415 U.S. 36 (1974), the Tenth Circuit argues that the tolling rule was "in tune with the construction given by the Supreme Court and other federal courts to this kind of provision," *id.* The Tenth Circuit's interpretation of the applicable Supreme Court decisions contradicts the interpretation of the Sixth Circuit, 17a and 525 F.2d at 128.

was tolled for the preiod during which contractual grievance proceedings were being pursued.[12]

B.

There is an additional, related, but slightly different, conflict between the court below and the Seventh Circuit. The Sixth Circuit implicitly held that the period of limitations commences from the date of the discharge, rather than the date on which grievance proceedings ended and the company's decision to fire Mrs. Guy became final. In *Moore* v. *Sunbeam Corp.*, 459 F.2d 811 (7th Cir. 1972), the court took the opposite approach, and computed the statutory period within which charges might be filed with EEOC from the date on which grievance proceedings concluded.[13] Id. at 826-27 and n. 40.

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[12] The court below characterizes the 90-day limitation period on filing of charges with EEOC as an integral part of the right created by Title VII rather than as a statute of limitations subject to such equitable considerations as tolling in appropriate situations. This interpretation is inherently in conflict with the decisions of the Fifth, Ninth and Tenth Circuits cited above, as well as with the Seventh Circuit case of *Moore* v. *Sunbeam Corp.*, 459 F.2d 811 (1972), referred to below. This characterization was also specifically considered and rejected in *Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 929 (1975), and seems totally inconsistent with the decision of this Court in *Love* v. *Pullman Co.*, 404 U.S. 522 (1972).

[13] Although perhaps technically not a holding of the court, since the computation led to the conclusion that despite the extension of the period during which he might have filed, the plaintiff was nevertheless too late, the opinion clearly established the law of the Seventh Circuit on the subject.

See also *Phillips* v. *Columbia Gas of West Virginia, Inc.*, 347 F. Supp. 533, 538 (S.D. W. Va. 1972), affirmed w.o. op., 474 F.2d 1342 (4th Cir. 1972), treating the statutory time as starting to run upon the conclusion of the grievance proceedings, but dismissing the charge on other grounds. The analysis adopted in *Moore* v. *Sunbeam Corp., supra,* had also been advanced in *Culpepper* v. *Reynolds Metals Co., supra,* but not passed upon in that case because the decision that the limitation had been tolled made it unnecessary to do so. 421 F.2d at 893, n. 5. *See also, Malone* v. *North American Rockwell Corp., supra,* 457 F.2d at 781, n. 2.

The approach of the Seventh Circuit in *Moore* is in turn in conflict with the decisions of the Fifth, Ninth and Tenth Circuits. Under the tolling approach of the Fifth, Ninth and Tenth Circuits the statute would have been tolled during the 22 days of Mrs. Guy's grievance proceedings, from October 27 through November 18, 1971. Since Mrs. Guy filed her charge on the 108th day after her discharge, her charge under this approach would have been construed as being filed on the 86th day and therefore timely. If the Seventh Circuit approach had been applied, the statute would have started running on November 18, 1971 (the date of the final resolution of the grievance). The filing by Mrs. Guy of an EEOC charge on February 10, 1972, 84 days later, would have again been held timely. Thus, if the Sixth Circuit had followed either of the alternatives adopted by the other circuits, Mrs. Guy's complaint would not have been dismissed. However, the conflict between the approaches of the Seventh Circuit and that of the Fifth, Ninth and Tenth Circuits, may sometimes cause a different result. For example, if Mrs. Guy had filed her charge on February 15, 1972 (rather than February 10, 1972), the charge would have been construed as being filed on the 89th day pursuant to the approach of the Seventh Circuit and thereby timely; however, pursuant to the approach of the Fifth, Ninth and Tenth Circuits the charge would have been construed as being filed on the 91st day and thereby untimely.

C.

The court of appeals also refuses to apply to this case the 1972 amendments to Title VII, even though this case was still pending on the date when the amendments became effective (17a, 525 F. 2d at 128). The 1972 amendment extended the period in which an EEOC charge must be filed from 90 to 180 days, 42 U.S.C. 2000e-5(e). As Judge Ed-

wards noted in his dissent (19a-20a), this decision is squarely in conflict with the decision of the Ninth Circuit in *Davis* v. *Valley Distributing Co.*, 522 F. 2d 827 (1975), which held that the 180-day rule must be applied to such pending cases. The decision in the instant case, is clearly inconsistent with the rule reaffirmed by this Court in *Bradley* v. *School Board of the City of Richmond*, 416, U.S. 696, 711 (1974), "that a court is to apply the law in effect at the time it renders its decision, unless there doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." [14]

The decision in this case as to the applicability of the 1972 amendments to pending charges is also inconsistent with *Love* v. *Pullman Co.*, 404 U.S. 522 (1972), where this Court refused to apply technicalities, such as a formalistic double filing of charges of discrimination, to the procedures which are undertaken by laymen under Title VII.[15]

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[14] Here the statute specifically mandates the application of the amendments to pending charges, Section 14 of the Equal Employment Opportunity Act of 1972; 86 Stat. 103, 113.

The question of the applicability of the 1972 amendments to previously filed charges is independently important, in the light of the huge number of charges that were being filed every year with EEOC, and the large backlog of charges on which EEOC had not completed processing and which were still pending at the time of the enactment of the amendments. See H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 3 (1971); S. Rep. No. 92-415, 92d Cong., 1st Sess. 6 (1971).

[15] *Cf. Love* v. *Pullman Co.*, 404 U.S. 522 (1972), in which a charge had been filed prematurely with EEOC before submission to a state anti-discrimination agency, contrary to the statutory requirement that where there was such a state agency charges were to be filed with EEOC only after the expiration of certain time periods following filing with the state agency. After completion of the state proceedings, EEOC assumed jurisdiction over the charge without requiring a second filing, and this Court upheld its practice. The Court stated:

> . . . To require a second "filing" by the aggrieved party after termination of state proceedings would serve no purpose other

In both the instant case and the *Davis* case, the plaintiffs were discharged more than 90 but less than 180 days before they filed charges with EEOC. In both cases, charges were filed before March 24, 1972, the effective date of the 1972 amendments to Section 706 of the 1964 Act (the section including the time requirements for filing of charges with EEOC). In both cases the discharge had occurred less than 180 days before March 24, 1972; therefore in both cases, if the plaintiffs had engaged in the ridiculously superfluous act of re-filing with EEOC on or shortly after March 24, 1972, their position would have been immune to challenge. The Ninth Circuit, in the *Davis* case, refused to stultify the law by holding that an aggrieved party would forfeit his claim by failing to file a second, redundant charge.[16] The Sixth Circuit, in the instant case, held the opposite way.

II.

The Case Presents an Important Question of Federal Law Which Should Be Settled by This Court.

This case involves important and frequently recurring questions arising out of the interrelationship between the Congressional policies forbidding employment discrimination and those encouraging utilization of grievance-arbitration procedures.

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than the creation of an additional procedural technicality, such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process. (404 U.S. at 526-27)

[16] We should point out that *Davis* might be distinguished on the ground that there was a technical new "filing" by EEOC itself of plaintiff's late charge following remand from a state agency, just before March 24, 1972. But this scarcely weakens the main thrust of the *Davis* holding, that the retroactive provision in the 1972 amendments was intended to apply, *inter alia*, to previously filed charges, thus modifying the time within which those charges had to be filed with EEOC.

The conflict among the circuits is an irresistible invitation to forum-shopping. The venue provision of Title VII provides that a suit may be filed in several alternative jurisdictions.[17] Until this Court acts, Title VII plaintiffs will, or will not, lose their Title VII rights depending not only on the happenstance of the state in which they work, but also depending on the resourcefulness of their lawyer to select the jurisdiction with the "proper" tolling decisions.[18] Because many major employers and unions operate nationwide, venue often exists in several different circuits.[19]

This conflict poses serious administrative problems for the EEOC. The EEOC must apply different rules as to whether a charge should be deemed timely and accepted according to the circuit involved. Where, as is common, venue would lie in several different circuits with different rules, the EEOC will have to resolve complex problems of conflict of laws. EEOC has heretofore repeatedly held that the statutory limitations on the time within which charges

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[17] The plaintiff may bring his Title VII action in the district where the unlawful act is alleged to have been committed, where plaintiff would have worked but for the alleged practice or where employment records pertaining to the unlawful practice are maintained and administered, or if the putative employer or union is not found within any such district, a Title VII action may be brought within the judicial district in which he has his principal office, 42 U.S.C. §2000e-5(f).

[18] Of course, counsel may devise many theories for selecting the jurisdiction in which there is an "appropriate" rule on "tolling." *Cf. Laffey* v. *Northwest Airlines, Inc.*, 321 F. Supp. 1041 (D. D.C. 1971). (Because the plaintiff joined a cause of action under Title VII with a cause of action under the Equal Pay Act of 1963, 29 U.S.C. §§206(d)(1), *et seq.*, the district court held that the general venue provision for federal courts applied.)

[19] Often, as is the case for a plaintiff like Mrs. Guy who lives in Memphis, it is convenient to bring an action in a number of circuits. It is only a short drive from Memphis to either the Eighth or the Fifth Circuits.

might be filed with it were tolled during the prosecution of grievance proceedings, and that where the timeliness of the charges depended upon such tolling EEOC had authority to process them and, if conciliation was not achieved, to authorize the charging parties to commence suit in district court pursuant to Title VII.[20] EEOC interpretations of Title VII are, of course, entitled to great deference. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 431 (1975). If the court does not resolve the conflicts between the circuits, the EEOC will be confronted with the bureaucratic tangle of processing charges of discrimination according to the state in which they arise.[21]

The other circuits have permitted tolling of the period for filing of charges with EEOC while grievance proceedings were being pursued, in order to protect against inadvertent loss of Title VII rights by employees following the common-sense approach of seeking first to resolve their disputes through the machinery established by the collective bargaining agreements. The decision of the court

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[20] While EEOC has not published formal regulations on the subject, it has announced its interpretation in EEOC Decision No. 70-675, March 31, 1970, CCH EEOC Dec. ¶ 6142 (1973), CCH Empl. Prac. Rep. ¶ 2325.123, and EEOC Decision No. 71-687, Dec. 16, 1970, CCH EEOC Dec. ¶ 6186 (1973), CCH Empl. Prac. Rep. ¶ 2325.302. Moreover, it has consistently both accepted and processed claims its jurisdiction over which has depended upon such tolling, and has issued right-to-sue letters upon failure of conciliation in such cases—as it did, for example, in the instant case. Finally, EEOC has reiterated its interpretation of the statute in its *amicus curiae* briefs filed in support of petitioner's appeal and petition for rehearing in the court below.

[21] Federal officials in the Atlanta regional office of EEOC which is responsible for processing charges of discrimination arising in states covered by both the Fifth and Sixth Circuits would be confronted with accepting and processing charges filed by Mississippians which on the same facts they would reject as untimely filed if filed by Tennesseeans.

below now casts serious doubt as to whether such employees are in fact protected. Unless that doubt is resolved, civil rights organizations, labor unions, and EEOC, will have the practically impossible task to try to keep employees informed of the danger that if they do not go through the motions of filing a charge with EEOC while pursuing their grievance remedies they may lose their right to sue under Title VII. The difficulty of the task is compounded by the fact that the message concerning the application of a federal statute will be different if the member of the union or civil rights organization works in, for example, Mississippi, Tennessee or Illinois.

Procedures of the type involved in this case are common in collective bargaining agreements involving millions of workers. Complaining employees are seldom represented by attorneys at the grievance stage, nor are many of them knowledgeable as to legal matters. See *Love* v. *Pullman Co.*, 404 U.S. 522, 527 (1972). As set forth above, there has been a steady stream of reported cases involving the principal question raised here—whether pursuit of the grievance procedures does or does not toll the statute of limitations for filing charges with the EEOC. In almost all of thes cases the courts have held that the limitations are tolled. Congress, in enacting the 1972 amendments to Title VII, was apparently concerned over the problem of potential forfeiture of Title VII claims by uninformed employees allowing the filing period to expire, and indicated its approval of the prevailing tendency of the courts to ameliorate some of the harsher applications of the limitation.[22]

The rule adopted by the Sixth Circuit in this case is contrary to public policy in that it requires the filing of an administrative charge before it is even clear if there

[22] 118 Cong. Rec. 7167 (March 8, 1972).

is an act which "aggrieves" the individual, and, if there is such an act, then before the final scope of that act has been defined. In a plant which is subject to union grievance proceedings, any decision by the employer is tentative until those proceedings have been completed. Until that time the aggrieved employee does not know what action, if any, the employer will actually take. The instant decision requires an employee to file a charge with EEOC before he or she knows for sure what discriminatory conduct the employer will undertake or whether he will decide to persist in such conduct at all. That rule makes no more sense than requiring an employee, aggrieved by the decision of his or her foreman, to file a charge with EEOC before appealing that decision to higher management.

The courts of appeals holding[23] that the amendment to Title VII passed in 1972 which extended the period for filing a charge with the EEOC from 90 to 180 days does not apply to pending charges and litigation is contrary to the principle "that a court is to apply the law in effect at the time it renders its decision." *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974); *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268 (1969); see also *supra* at 11.

The court of appeals ruling that the filing of a union grievance did not toll the running of the Title VII statute of limitation for filing an EEOC charge was based on a misinterpretation of *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) and *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975). *Alexander* holds that grievance-arbitration procedures and Title VII actions are independent in the sense that utilization of the former is not an election of remedies barring employment of the latter. The Court, however, makes clear that "Title VII

[23] 17a and 525 F.2d at 128.

was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." 415 U.S. at 48-49. And its conclusion "that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII" (415 U.S. at 59-60) argues against, rather than for, the decision of the court below that the employee's pursuit of the grievance-arbitration procedure should be allowed to result in the inadvertent loss of his rights under Title VII.[24] *Johnson* v. *Railway Express Agency,* is not applicable to the issue presented. In ruling that the processing of Title VII charges does not toll the statute of limitations for 42 U.S.C. § 1981, *Johnson* holds only that under § 1981 the state statute of limitations that is borrowed is applied in its entirety, including the presence or absence of the possibility of tolling as part of the state's statutory scheme. (421 U.S. at 463-64). It has no bearing upon the question of Congressional intention with regard to the propriety of tolling of limitation periods provided in a *federal statute.*

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

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[24] At the very least, *Alexander* v. *Gardner-Denver Co.,* does not foreclose the issue adversely to petitioner's claim. Compare *Hutchings* v. *United States Industries, Inc.,* 428 F.2d 303 (5th Cir. 1970), squarely holding *both* that institution of grievance-arbitration proceedings tolled the statute of limitations for filing charges with EEOC *and* that an adverse decision in arbitration did not preclude a cause of action under Title VII.

Alternatively, this petition for a writ of certiorari should be held pending the resolution of *McDonald* v. *Santa Fe Transportation Company, Brown* v. *General Services Administration,* and *Place* v. *Weinberger.*[25] If the Court determines that the processing of a union grievance tolls the running of the Title VII statute of limitations or that the Title VII statute of limitations period does not run until after the completion of the grievance process (*McDonald*), or that the 1972 amendments to Title VII should be applied to pending cases (*McDonald, Brown* or *Place*), the Court should grant the writ of certiorari, vacate the decision of the Sixth Circuit and remand with appropriate instructions.

Respectfully submitted,

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[25] As set forth above, *McDonald* v. *Santa Fe Transportation Co.*, raises all three of the issues in conflict presented by this petition; *Brown* and *Place* raise a closely analogous issue concerning the application of the 1972 amendments to Title VII to charges and litigation pending as of the effective date of the amendments, see *supra* at 7.

APPENDIX

Opinion of the District Court, June 12, 1974

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

No. C-74-165

DORTHA ALLEN GUY,

Plaintiff,

vs.

ROBBINS & MYERS, INC. (HUNTER FAN DIVISION), et al,

Defendants.

MEMORANDUM OPINION AND ORDER

Defendant has renewed its motion to dismiss plaintiff's suit because of her failure to comply with 42 U.S.C. §2000e-5(d) requiring the filing of a charge with Equal Employment Opportunity Commission within 90 days after the alleged unlawful employment practice occurred.[1] The relevant times and acts that took place in this case all occurred prior to March 24, 1972. The amendment extending the time for filing 42 U.S.C. §2000e-5(e) was prospective in its application. From the pleadings and memorandum filed on plaintiff's behalf, it is clear that she was to report back

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[1] This provision in the 1964 Civil Rights Act dealing with employment discrimination was amended March 24, 1972, by the 1972 Civil Rights Act. (42 U.S.C. §2000e-5(e)).

to work on October 24, 1971, when her sick leave expired. On October 29, 1971, when she returned to work, she found that she had been terminated on October 25, 1971, as having voluntarily quit, a status she contested by filing a union grievance on October 27, 1971. She filed a charge against her employer with E.E.O.C. on February 10, 1972, asserting that the Company's action was unfair. (She did not describe it as discriminatory).

"It is true that the statute requires the person aggrieved to file a written charge within 90 days; it says so clearly and the courts so hold." *Fore* v. *Southern Bell Tel. Co.*, 293 F.Supp. 587, 588 (W.D. N.C. 1968). See also *McCarty* v. *Boeing Co.*, 321 F.Supp. 260 (W.D. Wash. 1970); *Younger* v. *Glamorgan Pipe Co.*, 310 F.Supp. 195 (W.D. Va. 1969); *Gordon* v. *Baker Prot. Services*, 358 F.Supp. 867 (N.D. Ill. 1973); and *Heard* v. *Mueller Co.*, 464 F.2d 190 (6th Cir. 1972).

"It may be conceded that a typical lay-off, without more, is not a continuing event, but is a completed act at the time it occurs, so that a charge alleging a discriminatory lay-off must ordinarily be filed within 90 days thereafter." *Sciaraffa* v. *Oxford Paper Co.*, 310 F.Supp. 891 (D. Me. 1970). From the complaint itself the alleged discriminatory discharge and refusal to reinstate took place in October, 1971, more than 90 days prior to the charge with the E.E.O.C. on February 10, 1972. Unless the act complained about were continuous in its nature, re-occurred after October, 1971, or unless the period were somehow tolled, plaintiff is barred because of her failure to comply with statutory jurisdictional requisites. *Choate* v. *Caterpillar Tractor*, 402 F.2d 357 (7th Cir. 1968); *Mickel* v. *S. C. State Emp. Service*, 377 F.2d 239 (4th Cir. 1967); *Sanchez* v. *Standard Brands*, 431 F.2d 455 (5th Cir. 1970).

> Senator Everett Dirksen on June 5, 1964, in explanation of changes made by the Senate in the House bill, with particular reference to Section 706(d):
>
> 'New Subsection (d) requires that a charge must be filed with the Commission within 90 days after the alleged unlawful employment practice occurred, except that if the person aggrieved follows State or local procedures in Subsection (b), he may file the charge within 210 days after the alleged practice occurred or within 30 days after receiving notice that the State or local proceedings have been terminated, whichever is earlier. The additional 120 days is to allow him to pursue his remedy by State or local proceedings." 11 Cong. Rec. 12297. *Banks* v. *Local Union #136*, 296 F.Supp. 1190 (1968)

Tennessee does not have a civil rights law or did not during 1971 and 1972.

Plaintiff contends, on the authority of *Culpepper* v. *Reynolds Metals*, 421 F.2d 888 (5th Cir. 1970), that the 90 day period is tolled because she filed a grievance directed toward the defendant company within that period.[2] See *Hutchings* v. *U. S. Industries*, 428 F.2d 303, 309 (5th Cir. 1970); *Malone* v. *North American Rockwell Corp.*, 457 F.2d 779, 781 (9th Cir. 1972); *Moore* v. *Sunbeam Corp.*, 459 F.2d 811, 826 (7th Cir. 1972). These cases, however, are based on the rationale that plaintiff should be encouraged first to try the grievance procedures before resorting to the E.E.O.C. and that the acts are interrelated in respect to disputes over discrimination. *Dewey* v. *Reynolds Metals*, 429 F.2d 324 (6th Cir. 1970) affirmed by a divided Supreme

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[2] She also complains that the defendant union failed to represent her fairly and diligently.

Court, 402 U.S. 689 (1971). *Dewey* and its progency held that pursuing a contractual grievance remedy to its conclusion might estop later pursuit by a claimant of E.E.O.C. procedures and suit; that the remedies were related and interconnected. *Culpepper, supra,* held, however, that utilization of grievance procedures did not estop, preclude, or constitute an election of remedies insofar as a grievant was concerned who might later claim violation of the 1964 Civil Rights Act equal employment provisions.

In 1974, however, the Supreme Court unanimously in *Alexander* v. *Gardner-Denver Co.*, —— U.S. ——, 42 L.W. 4214 (2-19-74) disavowed the *Dewey* v. *Reynolds Metals, supra,* rationale. At page 10 of the slip opinion, the Court acknowledges that "Title VII does not speak expressly to the relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements. It does, however, vest federal courts with plenary powers to enforce the statutory requirements; *and it specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit.*" (Emphasis ours.) The Court goes on to hold that grievance-arbitration procedures neither foreclose nor preclude an individual's E.E.O.C. rights and requirements, nor divest the court of jurisdiction to decide equal employment discrimination questions that may arise under the Act. In other words, "Title VII manifests a Congressional intent to allow an individual to pursue independently his rights under Title VII" and other statutes or private contract remedies, even though these rights have a "distinctly separate nature." (pp. 11, 13 slip opinion, *Alexander* v. *Gardner-Denver, supra*). In another place, pp. 14, 15, Justice Powell, speaking for a unanimous court says "Title VII strictures are absolute" and "are not susceptible to prospective waiver."

Since rights under Title VII and under the contract between the parties "have legally independent origins and are equally available," it appears that both should proceed independently and in accordance with their own statutory or contractual limitations and requirements. The rationale of *Alexander* v. *Gardner-Denver Co., supra,* persuades this Court that the 90 day Title VII requirement for filing a claim with the E.E.O.C. after the occurrence of the alleged discriminatory event is not effected or abated or tolled by an independent grievance-arbitration proceeding under a contract. The E.E.O.C., after all, is required by the statute in question to attempt reconciliation and negotiation of the differences before further action is taken. Thus, grievance and conciliation procedures independently would work for a settlement and disposition of the disputes between employer and employee. Whether or not an employee files a grievance, or files an E.E.O.C. charge, he or she still has a separate right to claim 42 U.S.C. §1981 (1866 Civil Rights Act) violations. *Long* v. *Ford Motor Co.,* —— F.2d —— (6th Cir. 4-30-74). That employee, however, must abide by applicable statute of limitations requirements as to a Section 1981 claim, just as he or she must also comply with contractual or 42 U.S.C. §2000e-5(e) prerequisites.

Since plaintiff did not file her claim with the E.E.O.C. within 90 days after her alleged discriminatory discharge, defendant employer's motion to dismiss the 1964 Civil Rights, Title VII, claim is granted.

This 12th day of June, 1974.

HARRY (Illegible)
United States District Court Judge

CERTIFIED TRUE COPY
J. FRANKLIN REID, Clerk
By (Illegible)
Deputy Clerk

Opinion of the District Court, June 19, 1974

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

No. C-74-165

DORTHA ALLEN GUY,

Plaintiff,

vs.

ROBBINS & MYERS, INC.
(Hunter Fan Division), et al.,

Defendants.

ORDER ON RECONSIDERATION

The Court on May 30, 1974, entered an order in this cause dismissing plaintiff's alleged cause of action under 42 U.S.C. §1981 and overruling defendant's motion on the question as to whether the filing of her complaint came within the 90 day period after issuance of the right-to-sue letter. (In effect, because it involved a possible factual dispute, it was held to be appropriate to reserve a ruling for a hearing on the merits.) Without then expressly so ruling, the Court indicated that the recent Supreme Court decision of *Alexander* v. *Gardner-Denver Co.*, —— U.S. ——, 94 S.Ct. 1011, 42 L.W. 4214, 1974) "might indicate that the Union contractual grievance and the E.E.O.C. claim, being independent of each other, . . . would not

amount to a tolling of nor effect any extension of a [90 day] limitation period. See *Johnson* v. *R.E.A.*, 489 F.2d 525, 529 (6th Cir. 1973) *reh. denied*, (1974) petition for certiorari applied for."

Plaintiff moved to amend her complaint, and defendant Robbins & Myers moved the Court to reconsider and formally rule on its motion to dismiss alleging plaintiff's failure to file her charge with E.E.O.C. within 90 days of the happening of the alleged discriminatory act on defendant Robbins & Myers' part.

The Court then entered an order ruling on defendant Robbins & Myers' motion to dismiss and sustaining it on the failure of plaintiff to file a claim with E.E.O.C. within the statutory period. (See the memorandum opinion and order dated June 12, 1974). Plaintiff has moved that the Court reconsider this opinion, especially in light of *Schiff* v. *Mead Corp.*, 3 EPD #8043 (6th Cir. 1970), unreported. The Court was aware of this decision, however, when it rendered its opinion adverse to plaintiff's contentions. The primary factor involved there was a change of position on the part of E.E.O.C. which influenced the Court[1] to decide that the filing of a contractual grievance might toll the 90 day statutory period prescribed in 42 U.S.C. §2000e-5(d).[2] The *Schiff* v. *Mead Corp.* case, however, was decided at a time that *Dewey* v. *Reynolds Metals*, 429 F.2d 324 (6th Cir. 1970) affirmed by an equally divided Supreme Court, was considered the law in this Circuit. The *Dewey* rationale was overruled in *Alexander* v. *Garden-Denver Co., supra.* It was there emphasized that the E.E.O.C. claims and procedures were separate and independent and that action

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[1] (U.S.D.C. N.D., Ohio)

[2] Now amended by the 1972 Equal Employment Opportunity Act.

or conduct taken in behalf of one such claim had no preclusive effect on the other. *Johnson* v. *R.E.A., supra,* had held that filing of an E.E.O.C. charge did not toll the statute of limitations on a 42 U.S.C. §1981 civil rights action. *Long* v. *Ford Motor Co.*, #73-1993, —— F.2d —— (6th Cir. 4-30-74) held that 42 U.S.C. §2000e (Title VII) actions and 42 U.S.C. §1981 are independent of one another, and, as we construe it, that the District Court[3] was correct in holding that the Title VII statutory time requirements for filing a charge were not tolled by the filing of a suit under the 1866 Civil Rights Act. On the other hand, the District Court's findings for the claimant under the latter statute were to be reconsidered on remand in light of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

On the face of the Title VII statute, the only means of tolling the 90 day period for filing an E.E.O.C. charge after the alleged discriminatory event was (and is) a filing of a charge or claim with a state or local agency having authority to deal with equal employment opportunities and discrimination. This plaintiff Guy could not do, because Tennessee nor Shelby County has any such agency or law authorizing such a body.

After the discharge in question, Guy had a legal right to file a grievance against her employer under the Union contract, provided she adhered to its terms. Whether or not she filed her grievance, plaintiff also had a right within 90 days to file a charge of racial discrimination. Within a year, whether or not she pursued contractual or E.E.O.C. procedures, she had a right to file suit for alleged discrimination under 42 U.S.C. §1981. Plaintiff failed to follow through with either of the latter two statutory rights in accordance with applicable time requirements. Defen-

[3] (U.S.D.C. E.D., Mich.)

dant's motion to dismiss is proper under these circumstances.

It should be noted that plaintiff did in fact pursue her grievance through three levels unsuccessfully.[4] Furthermore, E.E.O.C. investigated her claim and determined on November 20, 1973, that "the Commission finds no reason to believe that race was a factor in the decision to discharge. . ." Plaintiff waited until the last day of the 90 days given her, or until beyond the ninetieth day in which to seek the Court's assistance in filing her Title VII suit after having received an adverse determination to her claims since October of 1971. This lack of diligence, in and of itself, might not constitute a bar, *Harris* v. *Walgreen's Dist. Center,* 456 F.2d 588 (6th Cir. 1972), but is indicative of plaintiff's dilatory role in these proceedings throughout. See *Fekete* v. *U.S. Steel,* 424 F.2d 331 (3rd Cir. 1970) as to the effect of a negative E.E.O.C. determination involving "possibilities of sophisticated discrimination . . . because of European ancestral origin" after an arbitrator's reinstatement of claimant with back pay—an entirely different situation from that at bar. Compare *Beverly* v. *Lone Star Lead,* 437 F.2d 1136 (5th Cir. 1971) dealing with this question where plaintiff filed his claim with E.E.O.C. a week after the alleged discriminatory event, and within approximately 20 days after an adverse E.E.O.C. determination, filed his suit in federal court.

Mrs. Guy was not "penalized" for her seeking "to adjust her dispute with her employer through the private machinery of the grievance procedure" as described in *Malone* v. *N. American Rockwell,* 457 F.2d 779 (9th Cir. 1972). That case did not decide whether there had been a

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[4] See the findings and conclusions of E.E.O.C. filed as a part of the record in this cause.

continuing act of discrimination for failure to promote, or whether the settlement of a grievance was in itself a discriminatory act with respect to whether claimant had delayed too long in filing a claim with E.E.O.C. after intervening investigation by a state employment opportunities commission. This Court has granted the motion to dismiss upon reconsideration, because plaintiff, a Union steward, did not comply with Title VII statutory time requirements of filing her E.E.O.C. charge after her termination.

Plaintiff's claims against the employer, Robbins & Myers, must stand dismissed.

CERTIFIED TRUE COPY
J. FRANKLIN REID, *Clerk*

BY M. CLEAUES
Deputy Clerk

United States District Court Judge

Date:

Opinion of the Court of Appeals, October 24, 1975

Nos. 72-2144 & -2145

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE.

DORTHA ALLEN GUY

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFI-CIO LOCAL 790,

Plaintiff-Appellants,

v.

ROBBINS & MYERS, INC.
(HUNTER FAN DIVISION),

Defendant-Appellee.

Decided and Filed October 24, 1975.

Before:

WEICK, EDWARDS and PECK,

Circuit Judge.

WEICK, Circuit Judge, delivered the opinion of the Court, in which PECK, Circuit Judge, joined, EDWARDS, Circuit Judge, (pp. 8-10) filed a separate dissenting opinion.

WEICK, Circuit Judge. Appellant Guy has appealed from an order of the District Court dismissing her complaint for

wrongful discharge brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. and 42 U.S.C. § 1981. She claimed that her employer discharged her on account of her race (Negro).

The District Court granted the defendant's motion to dismiss her Title VII claim on the ground that plaintiff had not met the jurisdictional prerequisites of § 2000e-5(d) of the Act which were in force at the time.[1] The Act required her to file a charge with the Equal Employment Opportunity Commission (EEOC) within 90 days from the date of her discharge. She did not file the charge until after the lapse of 108 days.

The District Court dismissed her claim for violation of § 1981 of 42 U.S.C. on the ground that it was barred by the one year Tennessee statute of limitations. Tenn. Code 28-304.

It was Guy's contention that the 90 day requirement of the Act was tolled during the pendency of a grievance which she had filed with her employer under the provisions of a collective bargaining agreement entered into between her employer and the defendant labor Union.

The sole appellate issue is whether the filing of the grievance tolled the jurisdictional requirements of the Act.

Guy's claim under 42 U.S.C. § 1981 was controlled by our decision in *Johnson* v. *Railway Express Agency, Inc.*, 489

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[1] "(d) A charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practices occurred. Except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b) of this section, such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency."

F.2d 525 (6th Cir. 1973), which was affirmed by the Supreme Court on May 19, 1975, 95 S.Ct. 1716 (1975). Guy has not appealed from this ruling and it has become final.

The Union originally was a party defendant but was dismissed by agreement with the plaintiff and has been realigned as a party plaintiff.

The facts pertaining to the Title VII issue were not in dispute. Guy was discharged on October 25, 1971 for failing to report for work following an authorized sick leave. A co-worker filed a grievance for her with the employer on October 27, 1971 which stated: "Protest unfair action of company for discharge. Ask that she be reinstated with compensation for lost time." She did not explicitly claim racial discrimination. Guy processed her grievance to the third step under the collective bargaining agreement. The company rejected the grievance on November 18, 1971. Guy decided not to proceed further to arbitration. Instead she filed a charge with EEOC on February 10, 1972 which was 108 days from the date of her discharge.

The EEOC, although finding no evidence of racial discrimination, granted a right to sue letter which resulted in the filing of the present suit.

The District Judge was of the opinion that this case was controlled by the recent decision of the Supreme Court in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974).

While the specific holding in *Gardner-Denver* was that the adverse decision of an arbitrator did not foreclose resort by the grievant to her federal remedy, the reasoning of the court, in our judgment, supports the proposition that the filing of a grievance under a collective bargaining agreement does not toll the limitation period of an applicable federal or state statute.

The court pointed out that "in instituting an action under Title VII the employee was not seeking to review an arbi-

trator's decision but was asserting a right independent of the arbitration process."

The court referred to the legislative history which indicated Congressional intent that an employee could pursue any remedy which he may have under state or federal law. Thus, the employee could file proceedings under the National Labor Relations Act or with other federal, state or local agencies or pursue contractual remedies. In *Johnson* v. *Railway Express Agency, supra,* the court held that the various remedies are "separate, distinct and independent."

It would be utterly inconsistent with the thesis of *Gardner-Denver* and *Railway Express Agency* to hold that the pursuit of any of these remedies operates to toll other remedies which the employee has a right to resort to concurrently. See the statements of Senators Humphrey and Dirksen reported in 11 Cong. Rec. 12297 and quoted in *Banks* v. *Local Union, 136 Int'l Bhd. Elec. Eng'rs,* 296 F.Supp. 1188 (N.D. Ala. 1968).

In Tennessee, Civil Rights remedies are not provided by state or local law.

Subsection 5(d) of the Act contains an exception when the grievant has availed himself of remedies provided by state or local Civil Rights agencies and in such a case extends the time for filing a charge with EEOC from 90 days to 210 days after the unlawful employment practice or within 30 days after receipt of notice of termination of state or local proceedings, whichever is earlier.

Guy would have us add another exception to the Act to toll the limitations' period of 90 days when the grievant resorts to a contractual remedy under a collective bargaining agreement.

We are not persuaded that we should add additional exceptions not authorized by Congress.

But most important is the language of Mr. Justice Powell who wrote the unanimous opinion of the court in *Gardner-Denver* at 47:

> . . . It does, however, vest federal courts with plenary powers to enforce the statutory requirements; and it specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit. In the present case, these prerequisites were met when petitioner (1) filed timely a charge of employment discrimination with the Commission, and (2) received and acted upon the Commission's statutory notice of the right to sue. 42 U.S.C. §§ 2000e-5 (b), (e), and (f).

This is a clear pronouncement that the 90 day limitation period in the Act for filing a charge with EEOC is a jurisdictional prerequisite "that an individual must satisfy before he is entitled to institute a lawsuit." Here Guy admittedly did not meet the jurisdictional prerequisite.

The limitation in Title VII is more than a mere statute of limitations. The Act creates a right and liability which did not exist at common law and prescribes the remedy. The remedy is an integral part of the right and its requirements must be strictly followed. If they are not, the right ends.

As early as 1886 the Supreme Court recognized the distinction between a statute of limitation and a limitation contained in a statute creating liability and imposing a remedy. In *The Harrisburg,* 119 U.S. 199, 214, the court stated:

> . . . [W]e are entirely satisfied that this suit was begun too late. The statutes create a new legal liability, with the right to a suit for its enforcement, provided

the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. . . .

In *Matheny* v. *Porter, Price Adm'r,* 158 F.2d 478, 479 (10th Cir. 1946), the court said:

> . . . Ordinarily, a statute of limitation does not confer any right of action, but merely restricts the time within which the right finding its source elsewhere may be asserted. It is not a matter of substantive right. It neither creates the right nor extinguishes it. It affects only the remedy for the enforcement of the right. And unless it affirmatively appears from the face of the complaint that the cause of action is barred by the applicable statute, limitation must be presented by special plea in defense. . . .
>
> But here, section 205(e) creates a new liability, one unknown to the common law and not finding its source elsewhere. It creates the right of action and fixes the time within which a suit for the enforcement of the right must be commenced. It is a statute of creation, and when the period fixed by its terms has run, the substantive right and the corresponding liability end. Not only is the remedy no longer available, but the right of action itself is extinguished. The commencement of the action within the time is an indispensable condition of the liability. Cf. The Harrisburg, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358; Midstate Horticultural Co., Inc. vs. Pennsylvania R. Co., 320 U.S. 356, 64 S.Ct. 128, 88 L.Ed. 96.

In *Callahan* v. *Chesapeake & O. Ry. Co.*, 40 F.Supp. 353, 354 (E.D. Ky. 1941), District Judge Mac Swinford stated:

> The rule is stated in the syllabus from Morrison v. Baltimore & Ohio Railroad Company, 40 App. D.C. 391, Ann. Cas. 1914C, page 1026, as follows: "Under the Federal Employers' Liability Act of June 11, 1906, (Fed. St. Ann. 1909 Supp. p. 585) the time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statute, and the limitations of the remedy are therefore to be treated as limitations of the right."

Johnson v. *Railway Express Agency, supra,* held that the timely filing of a charge with EEOC under Title VII of the Act did not toll Tennessee's applicable one year statute of limitations. It would therefore appear to us to be utterly incongruous for us to hold that a federal statute which contains jurisdictional prerequisites for the exercise of its remedies is tolled by the mere filing of a grievance under a collective bargaining agreement.

Under Guy's contention the exercise of rights under Title VII could be delayed indefinitely for many years while an individual is pursuing other remedies. This contention conflicts with Congressional intent made manifest by the short periods of time provided in the Act as prerequisites for the exercise of the rights.

Guy relies on the following decisions from other Circuits: *Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888 (5th Cir. 1970); *Hutchings* v. *U.S. Industries, Inc.*, 428 F.2d 303 (5th

Cir. 1970); *Malone* v. *North American Rockwell Corp.*, 457 F.2d 779 (9th Cir. 1972); *Sanchez* v. *T.W.A.*, 499 F.2d 1107 (10th Cir. 1974).

It is noteworthy that all of these cases, except *Sanchez*, were decided prior to *Gardner-Denver* and hence are inapposite. *Sanchez* relies on these prior decisions. *Sanchez* conflicts with *Johnson* v. *Railway Express Agency, supra.*

In the brief of EEOC as amicus curiae a new issue is injected into the case which was not raised by plaintiff in the District Court, namely, that under the 1972 amendments to Title VII it had authority to assume jurisdiction retroactively to charges pending before the Commission. It relies on *Love* v. *Pullman Co.*, 404 U.S. 522 (1972).

Since this issue was not raised in the District Court by any party to the case, we are not required to consider it. *United States* v. *Summit Fid. & Sur. Co.*, 408 F. 2d 46 (6th Cir. 1969); *Wiper* v. *Great Lakes Engineering Works*, 340 F. 2d 727 (6th Cir.), *cert. denied*, 382 U.S. 812 (1965).

We do note, however, that in *Love, supra*, the charge had been timely filed with the Commission so that the jurisdictional prerequisite had been met.

Plaintiff Guy's claim was barred on January 24, 1972. She did not file her charge with EEOC until February 10, 1972. The amendments to Title VII, increasing the time within which to file her charge to 180 days, did not become effective until March 24, 1972. 42 U.S.C. § 2000e-5(e). The subsequent increase of time to file the charge enacted by Congress could not revive plaintiff's claim which had been previously barred and extinguished.

The judgment of the District Court is affirmed.

EDWARDS, Circuit Judge, dissenting. Appellant Guy was discharged for failure to report back to work on her

production job with appellee Robins and Meyers at the end of sick leave which had been granted to her. She claims that she notified appellee that she was not able to return on the day set, but when she did return four days later, she was informed she had been discharged.

Promptly on October 27, 1971, the union filed a grievance on her behalf, alleging that the discharge was illegal under the union-management contract. This grievance was denied at the third step on November 18, 1971. Thereafter plaintiff filed a charge, alleging that her discharge was racially motivated, before the Equal Employment Opportunity Commission. This charge was filed February 10, 1972, 108 days after her discharge. At the time the EEOC limitation provided for a 90-day period within which to file the charge. On March 24, 1972, however, Title VII was amended to increase the filing time to 180 days. See 42 U.S.C. § 2000e-5(d). EEOC, in an amicus brief filed in this appeal, asserts that the 1972 amendment should be read retrospectively as applicable to appellant's complaint, since it was pending in EEOC's possession at the time when the amendment became effective 151 days after plaintiff's discharge.

The EEOC position is that the amendment did not create a new cause of action. It merely increased the period from 90 to 180 days before the limitation became effective.

In *Davis* v. *Valley Distributing Co.*, —— F.2d —— (9th Cir. 1975) (No. 73-2725, decided July 30, 1975), the court, per Browning, J., held that a similar 180-day extension amendment (applicable to filing before the EEOC) should be given retroactive effect. The court said:

> The 1972 Act became effective March 24, 1972. The prior 90-day limitation had run on appellant's complaint some 54 days earlier. It is the general rule that

subsequent extensions of a statutory limitation period will not revive a claim previously barred. *James* v. *Continental Insurance Co.*, 424 F.2d 1064, 1065-66 (3d Cir. 1970). But the question is one of legislative intent; and though not free from doubt, we think it the more likely conclusion that Congress intended the extended limitations period to apply to all unlawful practices that occurred 180 days before the enactment of the 1972 Act, including those otherwise barred by the prior 90-day limitations period.

Section 14 of the 1972 Act provides:

> The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter.

Initially, both the House and Senate bills provided that the amendments to section 706 would *not* apply to charges filed prior to the effective date of the amendments. H.R. 1746, 92d Cong., 2d Sess. § 10 (1972); S. 2515, 92d Cong., 2d Sess. § 13 (1972). Section 14 was adopted primarily to make the new authority given EEOC to bring suit against alleged violators applicable to pending claims. *EEOC* v. *Kimberly-Clark Corp.*, 511 F.2d 1352, 1355 (6th Cir. 1975); *Koger* v. *Ball*, 497 F.2d 702, 708 (4th Cir. 1974). But Congress did not limit section 14 of the 1972 Act to the new remedy, although it would have been simple to do so. The language of section 14 is sweeping. It includes all amendments to section 706. Congress was, of course, aware of the other amendments to section 706 contained in the same bill. The provision extending the limitation periods

was called to Congress' attention by committee reports and in floor debate. In both the House and Senate, prior court decisions maximizing coverage within the given time limits were noted with approval, and the remedial purpose of extending the 90-day period to 180 days was emphasized.

The words of section 14 affirmatively suggest an intention to encompass discriminatory conduct that occurred before the Act was passed. "[C]harges pending with the Commission on the date of enactment of this Act" could only involve conduct occurring prior to that date. It might be contended that a charge filed with EEOC after the pre-amendment 90-day limitation had expired, as in this case, was not "pending" on the effective date of the Act. It is unnecessary to argue the point. Section 14 also makes the amendments applicable to "all charges filed thereafter." Since appellant's claim was not formally "filed" until EEOC assumed jurisdiction after the claim was returned by the Arizona Commission, it fell within the literal words of the statute.

There is no substantial reason for giving less than their full meaning to the words of section 14. Even as extended, the time limits under the statute are exceedingly short, particularly since, as Congress noted, most complainants are laymen representing themselves. The Equal Employment Opportunity Act is a remedial statute to be liberally construed in favor of victims of discrimination. *EEOC* v. *Wah Chang Albany Corp.*, 499 F.2d 187, 189 (9th Cir. 1974). Accordingly, "courts confronted with procedural ambiguities in the statutory framework have, with virtual unanimity, resolved them in favor of the com-

> plaining party." *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455, 461 (5th Cir. 1970).
> *Davis* v. *Valley Distributing Co., supra,* at —. (Footnotes omitted.)

This issue, as outlined above, was not presented to the District Court in our instant case, and in fairness to the District Judge, it should be.

I would remand this case for consideration of the effect of the 1972 EEOC amendments.

Order

Nos. 74-2144 & -2145

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

Dortha Allen Guy,
and
International Union of Electrical, Radio and Machine Workers, AFL-CIO Local 790,

Plaintiffs-Appellants,

vs.

Robbins & Myers, Inc. (Hunter Fan Division),

Defendant-Appellee.

Before

Weick, Edwards and Peck,

Circuit Judges.

This cause came on to be heard upon the petition for rehearing with the suggestion that it be reheard en banc. No active Judge having requested that the petition be reheard en banc, the petition for rehearing was considered by the panel and was found to be not well taken.

It is therefore Ordered that the petition for rehearing be and it is hereby denied. Judge Edwards dissents.

Entered By Order of the Court

/s/ John P. Hehman
Clerk